EMPLOYEE SERVICE DETERMINATION
L F P
S.S.A. No. XXX-XX-9746

This is the decision of the Railroad Retirement Board regarding whether the services performed by LFP for the Norfolk Southern (NS) constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. The NS is an employer (B.A. 1525) under the Acts administered by the Board. LFP last worked for the NS in January 2001.

LFP initially submitted a Form AA-4, Self-Employment and Substantial Service Questionnaire, to the agency's Richmond, Virginia district office in March 2007. In response to a questionnaire sent to him April 23, 2007, additional information was submitted by LFP by letter in May 2007 as well as by a letter dated July 7, 2007. According to the information submitted by LFP, after leaving the NS, LFP provided services to NS through Bomar Enterprises, a third party contractor with NS, which provided various services to NS, including customer service/traffic delivery. LFP left Bomar's employment in January 2002. Beginning July 18, 2002, LFP provided services to NS as LFPTDS, a sole proprietorship. According to the information contained in the July 7, 2007, letter LFP is no longer performing services as LFPTDS.

LFP described his duties as "contracted for customer service". According to a copy of an invoice for his services which LFP provided, his services were described as "traffic delivery services and other duties assigned in accordance with all terms and conditions of executed contracts on file with NS Intermodal in Norfolk, Virginia". In his letter of July 7, 2007, LFP stated "Customer Service/Traffic Delivery means assisting customers with locating their freight and other matters while on Norfolk Southern's lines". LFP performed his services on the premises of NS, did not advertise his services to the public, did not supervise anyone while performing these services, but was supervised by an NS supervisor while he was working. He would work approximately three days a week, and was paid hourly after submitting time sheets which were approved by mangers or supervisors of NS. LFP described his services as part of the everyday operations of the NS, and while his work hours coincided with the daily scheduled work hours of the NS, he did not routinely work with other employees of the NS, nor was he required to follow NS's work hours or schedules. LFP was required to furnish proof of insurance or bonding to NS.

The NS did not provide LFP with any equipment, materials or supplies, nor did NS reimburse him for the cost of any equipment, materials or supplies. The NS would provide LFP with office space, and according to his AA-4, LFP participated in NS's group medical plan.

In addition to obtaining information from LFP, the agency contacted the NS for additional information; specifically, detailed information about the services LFP performs as a consultant, compared to those services he provided as an employee. Information was submitted by Mr. Scott F. Wilkinson, Assistant General Tax Attorney for the NS, in a letter dated June 15, 2007. According to Mr. Wilkinson, when LFP was an employee of NS, he was the Assistant Manager of Traffic Delivery and was responsible for "a broader range of customer service functions in the Intemodal Traffic Delivery group in Norfolk, Virginia than he is an independent contractor". Mr. Wilkinson confirmed that from January 2001 through July 2002[1] LFP provided services to NS as an employee of Bomar Enterprises. Mr. Wilkinson further stated that from July 18, 2002 to the present[2] LFP has been performing customer service functions for the Intermodal Traffic Delivery Group in Norfolk, Virginia.

Mr. Wilkinson stated that LFP provides services "a maximum of 40 hours each week"[3]; is paid an hourly rate; provides time sheets to substantiate his work which are reviewed by an NS manager who then approves payment to LFP. Mr. Wilkinson described LFP's services as "administrative support to NS' intermodal operations". LFP works with NS employees as needed to resolve complicated matters, and primarily works with Bomar Enterprises employees who are performing similar customer service functions. He is required to work during NS' normal work hours "due to the customer service nature of the services he provides". LFP's services were further described as answering tracing calls to NS' intermodal customer service line and providing estimated times for shipment deliveries and departures, reasons for delay, contact information for NS employees. LFP also answers e-mail requests for similar information. Mr. Wilkinson describes LFP as an independent contractor, who receives work assignments through a random call queue, without direct supervision by NS management.

Mr. Wilkinson also supplied a copy of the Agreement between LFP and the NS, which states that LFP's relationship with the NS "is that of an independent contractor". In his letter Mr. Wilkinson explained that the NS considers LFP an independent contractor, and the NS "can terminate LFP's service agreement in writing at any time". Mr. Wilkinson also stated that the NS has the right to object to or request LFP's replacement.

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[1] The Board notes that this conflicts with the information provided by LFP that he ceased this employment in January 2002.

[2] The Board notes that this conflicts with the information provided by LFP that he ceased providing services to NS in March 2005.

[3] This also conflicts with the information provided by LFP, in which he stated he worked three days a week.

To be an employee of a covered railroad employer for purposes of benefit entitlement under the Acts administered by the Board, LFP must fall within the definition of that term provided by the Acts. Section 1(b) of the RRA and section 1(d)(i) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
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> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231(b) and (d)).

A determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and could hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. The Board has in recent years not

applied paragraphs (B) and (C) to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business, relying on the decision of the United States Court of Appeals for the 8th Circuit in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). The Kelm decision distinguished between services performed for the railroad by employees of a firm with a clearly independent existence, and services performed by an individual who primarily contracts to furnish only his own labor. 206 F. 2d at 835. Employees of a contracting firm must meet the direction and control requirements of paragraph (A), while single individuals contracting directly with the railroad may fall within the broader definitions of (B) or (C). In making a determination under these sections, the Board is not to be bound by the characterization of the relationship stated by the parties in a contract. Gatewood v. Railroad Retirement Board, 88 F. 3d 886, (10th Cir., 1996), at 891(holding with respect to an attorney's agreement to perform professional services for the railroad as an independent contractor that " * * *merely to state that such a relationship exists does not necessarily make it so * * * "). An independent contractor offers his service to the general public rather than to a specific employer. See May Freight Service, Inc. v. United States, 462 F. Supp. 503, 507 (E.D. N.Y., 1978). Similarly, an independent contractor generally may substitute another individual to perform the contract work, while an employee must perform the work himself. Gilmore v. United States, 443 F. Supp. 91, 97 (D. Md., 1977).

Applying these criteria to LFP's case, the Board finds that the Kelm decision does not prevent consideration under paragraphs (B) and (C) because despite calling LFPTDS a sole proprietorship, LFP did not operate as independent business enterprise. LFP worked only for NS and had no employees himself. LFP supplied no equipment, and had no investment in a business. Moreover, the language in the Agreement stating LFP is an independent contractor is not itself determinative when weighed with other evidence. Gatewood, supra, and Holt v. Winpisinger, 811 F. 2d 1532, 1538 (D.C. Cir., 1987)(employment relationship established under ERISA).

Mr. Wilkinson's description of the services performed by LFP shows that they are clearly technical services. LFP provides services to the NS, and those services are directly integrated into the management and operation of the railroad employer. Therefore, the Board finds that LFP is integrated into the employer's staff or operations, as is specified in paragraph (B) and (C).

Accordingly, in view of all the evidence in the record, it is the determination of the Board that service performed by LFP for Norfolk Southern from July 18, 2002 to the present is covered employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. The employer is directed to submit such returns of service and compensation with respect to LFP's service for the years 2002 to the present as Board staff may require.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever